

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TAMMY J. WILLIAMS and U.S. POSTAL SERVICE,  
WASHINGTON POST OFFICE, Washington, IN

*Docket No. 03-800; Submitted on the Record;  
Issued October 1, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's September 4, 2002 request for a merit review under section 8128(a) of the Federal Employees' Compensation Act.

On October 10, 2001 appellant, then a 43-year-old part-time flexible carrier, filed a claim for a right shoulder, arm and neck injury sustained on September 3, 2001 while unloading a truck full of flats of magazines.<sup>1</sup> Appellant stopped work on September 28, 2001 and returned to work in a limited-duty position from approximately October 25, 2001 through January 2, 2002.

In support of her claim, appellant submitted reports from Dr. Earl J. Craig, an attending Board-certified physiatrist. In an October 10, 2001 form report, Dr. Craig noted that appellant was injured in a December 25, 2000 slip and fall, but that magnetic resonance imaging (MRI) scans of the neck and right shoulder were negative. He diagnosed "rotator cuff weakness" and found appellant totally disabled from September 18 to October 24, 2001. Dr. Craig also noted work restrictions in an October 24, 2001 slip report. In a December 6, 2001 form report, he noted that appellant injured her right shoulder, hip and upper back on December 25, 2000 when she "fell on snow and ice," and reinjured these areas on September 3, 2001 while "pulling on equipment." Dr. Craig diagnosed "cervicothoracic pain."

By decision dated December 28, 2001, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant had established that the September 3, 2001 incident occurred at the time, place and in the manner alleged, but

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<sup>1</sup> In a November 26, 2001 letter, the Office advised appellant of the type of additional evidence needed to establish her claim. The Office specifically requested that appellant explain why she delayed more than 30 days in reporting the injury to her supervisor, provide a detailed description of the September 3, 2001 incident and provide medical evidence discussing the September 3, 2001 incident and any resulting medical condition.

that the medical evidence contained insufficient rationale to establish that unloading the truck on September 3, 2001 caused any injury.<sup>2</sup>

Appellant disagreed with this decision and in a September 4, 2002 letter requested reconsideration. Although appellant did not submit new evidence accompanying her request, the Office considered additional evidence of record submitted after issuance of the December 28, 2001 decision.

In reports from January 31 to June 19, 2001, Dr. Sterling E. Doster, an attending Board-certified orthopedic surgeon, related that, on December 25, 2000, appellant slipped and fell on ice, sustaining a right shoulder contusion with possible median and ulnar nerve involvement and a possible brachial plexus stretch.

In a September 18, 2001 report, Dr. Craig noted that the December 25, 2000 slip and fall causing right arm and shoulder pain aggravated by “heavy lifting.” He diagnosed right rotator cuff weakness and impingement, rule out cuff tear and probable lumbosacral radiculopathy at L5-S1. Dr. Craig stated that the diagnosed conditions appeared work related. He also submitted September 28, October 10 and 24, and December 6, 2001 progress notes.

In a January 10, 2002 letter, Dr. Craig noted that appellant was treated from October 1997 to June 1998 for shoulder pain and neck pain after a motor vehicle accident in 1997, with an April 13, 1999 follow-up for “similar problems in the neck and shoulder region.” Dr. Craig stated that appellant was referred to him “for a work-related injury that occurred on December 25, 2000 and a subsequent exacerbation that occurred on September 3, 2001.”

In a January 21, 2002 narrative report, Dr. Marshall M. Poor, an attending Board-certified neurosurgeon, related that, on December 25, 2000, appellant injured her right shoulder and hip after a fall while delivering mail, with persistent right scapular pain. Appellant’s condition improved, “but on September 3, 2001 [she] was unloading a truck at work and redeveloped neck and shoulder pain.” Dr. Poor noted that an MRI scan showed degenerative disc changes from C4 to C6, with spondylosis “much worse on the left than the right.” Dr. Poor opined that appellant’s right upper extremity problems were not related to degenerative cervical disc disease as those symptoms were left sided.

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<sup>2</sup> The record contains an August 29, 2002 letter from the Office to appellant regarding an August 15, 2002 claim for recurrence of disability under claim No. 09-2012261, which was apparently denied. Appellant’s claim on appeal is claim No. 09-2014461. Therefore, the August 15, 2002 claim for recurrence of disability is not before the Board on the present appeal.

In a January 21, 2002 report, Dr. Craig reviewed Dr. Poor's report and diagnosed "[r]ight rotator cuff weakness and impingement," "[c]ervicothoracic myofascial pain," and "[b]rachial plexitis versus thoracic outlet syndrome."<sup>3</sup>

A January 21, 2002 right hand x-ray was normal.

By decision dated October 31, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review of the December 28, 2001 decision. The Office noted that, although appellant did not submit additional evidence accompanying her September 4, 2002 request for reconsideration, additional medical evidence was received following the December 28, 2001 decision. "Evidence on file consisted of ... medical reports from Dr. Craig dated January 10 and 21, 2002, and an x-ray report dated January 21, 2002." The Office found that these new reports were of a cumulative nature, as they were "essentially the same information already on file." The Office further found that the three reports were irrelevant to the critical issue of causal relationship. The Office concluded that appellant submitted "[n]o new substantial evidence or medical reasoning ... to alter the Office's [prior] decision."<sup>4</sup>

Appellant filed her appeal with the Board on February 10, 2003.<sup>5</sup>

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>6</sup> As appellant filed her appeal with the Board on February 10, 2003, the only decision properly before the Board is the October 31, 2002 decision denying appellant's request for a merit review. The Office's December 28, 2001 decision denying appellant's claim on the grounds that fact of injury was not established is not before the Board on the present appeal.

The Board finds that the Office improperly denied appellant's September 4, 2001 request for reconsideration.<sup>7</sup>

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<sup>3</sup> Appellant also submitted: medical bills and an April 2002 collection notice; May to July 2001 hazard reports alleging that the trucks were improperly loaded so that magazines had to be pulled straight out of the back instead of from the sides; letters alleging that the employing establishment discarded her safety complaints and important forms related to her claim; a note alleging that a supervisor cancelled a November 14, 2001 appointment with Dr. Craig; appellant's description of the September 3, 2001 injury and her symptoms the following day. The Office did not mention any of these letters or forms in its October 31, 2002 decision.

<sup>4</sup> Following issuance of the October 31, 2002 decision, appellant submitted additional evidence. This evidence has not been considered by the Office. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 510.2(c). Appellant may submit this additional evidence to the Office accompanying a valid request for reconsideration.

<sup>5</sup> Appellant designated John Perry as her authorized attorney representative.

<sup>6</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>7</sup> See 20 C.F.R. § 10.606(b)(2)(i-iii) (2002).

Under section 8128(a) of the Act,<sup>8</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,<sup>9</sup> which provides that a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent new evidence not previously considered by the Office.<sup>10</sup> Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>11</sup>

Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,<sup>12</sup> it is necessary that the Office fulfill its obligation to review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,<sup>13</sup> it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the issuance of its final decision be addressed by the Office.<sup>14</sup>

In the October 31, 2002 decision, the Office enumerated what appears to have been intended to be a complete listing of the evidence of record submitted after issuance of the December 28, 2001 decision. However, this listing is incomplete. The Office stated that it reviewed only Dr. Craig's January 10 and 21, 2002 reports and the January 21, 2002 right hand x-ray. The Office did not include or in any way discuss Dr. Craig's September 18, 2001 narrative report, the medical evidence of record most contemporaneous to the September 3, 2001 incident. The Office also did not mention Dr. Craig's September 28 to December 6, 2001 treatment notes documenting appellant's right upper extremity condition in the months following the September 3, 2001 incident.

The Office also appears to be unaware of Dr. Poor's January 21, 2002 report, which attributes appellant's development of neck and shoulder symptoms to "unloading a truck at work" on September 3, 2001 and differentiated those symptoms from appellant's cervical disc disease. While the Office also did not mention Dr. Doster's reports dated January 13 to July 19, 2001, the Board notes that these documents describe appellant's condition prior to the September 3, 2001 incident and are therefore only of very limited relevance to appellant's claim for an injury related to that incident.

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.606(b) (2002).

<sup>10</sup> 20 C.F.R. § 10.606(b) (2002).

<sup>11</sup> 20 C.F.R. § 10.608(b) (2002).

<sup>12</sup> See 20 C.F.R. § 501.2(c).

<sup>13</sup> 20 C.F.R. § 501.6(c).

<sup>14</sup> *William A. Couch*, 41 ECAB 548 (1990).

As the Office decision implies that it did not review any evidence other than Dr. Craig's January 10, and 21, 2002 reports and the January 21, 2002 x-ray, the Office failed to meet its obligation to review all evidence appellant submitted following the December 28, 2001 decision. As the Office has not considered Dr. Poor's and Dr. Doster's reports, as well as Dr. Craig's September 18 to December 6, 2001 reports, the Office cannot have determined if they constitute new, relevant evidence warranting a merit review of the December 28, 2001 decision.

Therefore, the Board will set aside the Office's October 31, 2002 decision and remand the case so that the Office may properly consider all the evidence that appellant submitted subsequent to the December 28, 2001 decision to support her request for reconsideration. Following such development, the Office shall issue an appropriate decision in the case.

The decision of the Office of Workers' Compensation Programs dated October 31, 2002 is hereby set aside and the case returned to the Office for further development consistent with this decision.

Dated, Washington, DC  
October 1, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member